



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
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PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

June 29, 2021 Government Records Council Meeting

Joseph Semaan
Complainant

Complaint No. 2019-118

v.
City of Hackensack (Bergen)
Custodian of Record

At the June 29, 2021 public meeting, the Government Records Council ("Council") considered the June 22, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Pursuant to Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the record relevant to this complaint; to wit, the dash camera video from police vehicle #104 which captured an incident which occurred on June 17, 2019 at approximately 8:30 a.m. at or near the Fairmount Elementary School, to determine the validity of the Custodian's assertion that the record was lawfully denied because it discloses a citizen's personal information, thereby violating the citizen's reasonable expectation of privacy and depicts medical treatment or evaluation, which is exempt from disclosure pursuant to Executive Order 26 (Gov. McGreevey, 2002).
2. **The Custodian must deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see paragraph #1 above), a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rule 1:4-4,³ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as they arrive at the GRC office by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

Interim Order Rendered by the
Government Records Council
On The 29th Day of June 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: June 30, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
June 29, 2020 Council Meeting**

**Joseph Semaan ¹
Complainant**

GRC Complaint No. 2019-118

v.

**City of Hackensack (Bergen)²
Custodial Agency**

Records Relevant to Complaint: “I am requesting copies [via e-mail] of . . . dash camera video of the entire field incident that pertains to the information below:

Date of Incident: 6/17/2019

Time: Approximately 8:30 AM

Incident: Suspect refused to comply with school drop off procedure, bit and punched officers

Location: Fairmount Elementary School

Known officers involved: Lt. Tina Cappadonna, Capt. Nicole Foley

Suspect: 40-year-old, Parona Brown, Female”³

Custodian of Record: Deborah Karlsson

Request Received by Custodian: June 19, 2019

Response Made by Custodian: June 27, 2019

GRC Complaint Received: July 1, 2019

Background⁴

Request and Response:

On June 19, 2019, the Complainant submitted an Open Public Records Act (“OPRA”) request to the Custodian seeking the above-mentioned records. On June 27, 2019, the sixth (6th) business day following receipt of said request, the Custodian responded in writing informing the Complainant that the Hackensack Police Department has dash camera video of the incident but it cannot be disclosed pursuant to Executive Order 26 (Gov. McGreevey, 2002)(“EO 26”) because information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation is not subject to disclosure. The Custodian also denied the Complainant access to the

¹ No legal representation listed on record.

² Represented by Bradley D. Tishman, Esq., of Cleary Giacobbe Alfieri Jacobs, LLC (Oakland, NJ).

³ There were other records requested that are not relevant to this complaint.

⁴ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

records because she stated that OPRA requires that a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy. The Custodian stated that the video captures Ms. Brown in an extremely fragile state and disclosure of the video would violate her reasonable expectation of privacy.

Denial of Access Complaint:

On July 1, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant asserted that the City claimed the requested video clearly constitutes information relating to medical treatment or evaluation. The Complainant stated that although he requested the "entire field incident," he did not want video of medical treatment or evaluation, which he stated could be redacted. The Complainant stated that denial based upon the Custodian's opinion that a recording of Ms. Brown's "extremely fragile state" is not a lawful denial under OPRA because N.J.S.A. 47:1A-1 provides that the agency has an obligation to not disclose a citizen's "personal information" with which the agency has been entrusted when disclosure would violate the citizen's reasonable expectation of privacy. The Complainant stated that he did not request Ms. Brown's personal information; therefore, the privacy provision under N.J.S.A. 47:1A-1 is not a valid reason for denial of the requested records.

Statement of Information:

On July 22, 2019, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on June 19, 2019, and responded in writing on June 27, 2019.

The Custodian certified that the dash camera on police vehicle #104 recorded a citizen being transported via ambulance to a local hospital and the events surrounding the incident. The Custodian certified that prior to the video footage that was captured by the police dash camera, the citizen, who was "conspicuously pregnant," attacked two Hackensack police officers. The Custodian certified that the citizen was "extremely emotionally distraught, and she was blatantly in the midst of a medical episode for the duration of the incident captured on video. As such, release of the video would undoubtedly violate the citizen's 'reasonable expectation of privacy.'"

The Custodian also certified that the requested record was denied pursuant to Executive Order 26 (McGreevey), which provides "[t]he following records shall not be considered to be government records subject to public access pursuant to [OPRA] . . . Information concerning individuals as follows . . . Information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation[.]" The Custodian also cited Rivera v. v. Town of West New York, GRC Complaint No. 2010-208 in support of her argument for denial of access to the requested record.

Analysis

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Here, the Custodian denied the Complainant access to the requested record because the Custodian certified that pursuant to EO 26, information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation is not subject to disclosure. The Custodian also certified that disclosure of the record would violate the citizen’s reasonable expectation of privacy. The Complainant disputed the Custodian’s reasons for denying him access to the requested record. The Complainant stated that the Custodian could redact any footage that depicted medical treatment or evaluation. The Complainant also stated that N.J.S.A. 47:1A-1 provides that the agency has an obligation to not disclose a citizen’s personal information with which the agency has been entrusted when disclosure would violate the citizen’s reasonable expectation of privacy. The Complainant stated that he did not request Ms. Brown’s personal information; therefore, he was unlawfully denied access to the requested record.

In Paff v. N.J. Dep’t of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the complainant appealed a final decision of the Council⁵ dismissing the complaint by accepting the custodian’s legal conclusion for the denial of access without further review. The Court stated that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records . . . When the GRC decides to proceed with an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The Court also stated that:

The statute also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the Court stated that:

⁵ Paff v. NJ Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC's obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

Therefore, pursuant to Paff, 379 N.J. Super. at 346, the GRC must conduct an *in camera* review of the record relevant to this complaint; to wit, the dash camera video from police vehicle #104 which captured an incident which occurred on June 17, 2019 at approximately 8:30 a.m. at or near the Fairmount Elementary School, to determine the validity of the Custodian's assertion that the record was lawfully denied because it discloses a citizen's personal information, thereby violating the citizen's reasonable expectation of privacy and depicts medical treatment or evaluation, which is exempt from disclosure pursuant to EO 26.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Pursuant to Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the record relevant to this complaint; to wit, the dash camera video from police vehicle #104 which captured an incident which occurred on June 17, 2019 at approximately 8:30 a.m. at or near the Fairmount Elementary School, to determine the validity of the Custodian's assertion that the record was lawfully denied because it discloses a citizen's personal information, thereby violating the citizen's reasonable expectation of privacy and depicts medical treatment or evaluation, which is exempt from disclosure pursuant to Executive Order 26 (Gov. McGreevey, 2002).
2. **The Custodian must deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted record (see paragraph #1 above), a document or redaction index⁷, as well as a legal certification from the Custodian, in**

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⁷ The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

accordance with N.J. Court Rule 1:4-4,⁸ that the record provided is the record requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.

3. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart
Staff Attorney

June 22, 2021

⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."